AGENDA

PARTNERSHIPS AND LIMITED LIABILITY COMPANIES COMMITTEE

Thursday, December 9, 2004
10:30 a.m. - 12:00 p.m.

Via Teleconference
Call In Number 1-800-304-8043
Passcode: 471976
Directions: Dial the 800 number, enter the passcode
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Opinion of Bill Lockyer

Ca. A.G. 6th
07-23-2004
04103

Cite as 04 C.D.O.S. 6702

OPINION of BILL LOCKYER Attorney General, GREGORY L. GONOT, Deputy Attorney General

No. 04-103

In the Office of the Attorney General of the State of California

Filed July 23, 2004

THE HONORABLE KEVIN SHELLEY, SECRETARY OF STATE, has requested an opinion on the following question:

May a business that provides services requiring a license, certification, or registration pursuant to the Business and Professions Code conduct its activities as a limited liability company?

CONCLUSION

A business that provides services requiring a license, certification, or registration pursuant to the Business and Professions Code may conduct its activities as a limited liability company if the services rendered require only a nonprofessional, occupational license.

ANALYSIS

The Legislature has enacted a comprehensive statutory scheme, the Beverly-Killea Limited Liability Company Act (Corp. Code, § § 17000-17655; "LLC Act")[FOOTNOTE 1] to govern the formation and operation of a limited liability company ("LLC"). In *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 963, the court quoted from 9 Witkin, Summary of California Law (2001 Supp.) section 43A, page 346, in describing the characteristics of an LLC:

> " ' A limited liability company is a hybrid business entity formed under the Corporations Code and consisting of at least two ' members' [citation] who own membership interests [citation]. The company has a legal existence separate from its members. Its form provides members with limited liability to the same extent enjoyed by corporate shareholders [citation], but permits the members to actively participate in the management and control of the company [citation].' "

While treated like a partnership for income tax purposes, an LLC allows its owners to conduct their business without having personal liability for the obligations of the enterprise. (See § 17101; *Abrahim & Sons Enterprises v. Equilon Enterprises* (9th Cir. 2002) 292 F.3d 958, 962; Forming and Operating Cal. Limited Liability Companies (Cont. Ed. Bar 1995) § 1.2, pp. 2-3.) In order to form an LLC, an operating agreement must be executed and articles of organization must be filed with the Secretary of State. (§ 17050.)

We are asked whether a business that provides services requiring a license, certification, or registration pursuant to the Business and Professions Code may conduct its activities as an LLC. We conclude that it may do so if the services rendered require only a nonprofessional, occupational license.

Section 17002 generally authorizes an LLC to engage in "any lawful business activity" :

> " Subject to any limitations contained in the articles of organization and to compliance with any other applicable laws, a limited liability company may engage in any lawful business activity, except the banking business, the business of issuing policies of insurance and assuming insurance risks, or the trust company business."

One exception to this general authorization, and the statute critical to our analysis, is section 17375, which states that an LLC has no authority to perform certain "professional services" :

> " Nothing in this title shall be construed to permit a domestic or foreign limited liability company to render professional services, as defined in subdivision (a) of Section 13401 and in Section 13401.3, in this state."

"Section 13401 and . . . Section 13401.3," referred to in section 17375, are contained in the Moscone-Knox Professional Corporation Act (§ § 13400-13410; "PC Act"). Subdivision (a) of section 13401 provides:

> " ' Professional services' means any type of professional services that may be lawfully rendered only pursuant to a license, certification, or registration authorized by the Business and Professions Code, the Chiropractic Act, or the Osteopathic Act."

Section 13401.3 states:

> " As used in this part, ' professional services' also means any type of professional services that may be lawfully rendered only pursuant to a license, certification, or registration authorized by the Yacht and Ship Brokers Act (Article 2 (commencing with Section 700) of Chapter 5 of Division 3 of the Harbors and Navigation Code)."

Accordingly, an LLC may conduct certain businesses subject "to compliance with any other applicable laws" (§ 17002) but in any event has no authority to perform "professional services" (§ 17375) as defined in two statutes (§ § 13401, 13401.3) found in the PC Act.

How are these statutes to be interpreted and applied with respect to services requiring a license, certification, or registration pursuant to the Business and Professions Code? Over 60 occupational activities require such a license, certification, or registration, including barbers, locksmiths, private detectives, alarm companies, structural pest control operators, electronic and appliance repair shops, and automotive repair dealers. (See, e.g., Bus. & Prof. Code, § § 6980.10, 7065, 7317, 7520, 7592, 8560, 9840, 9884.)

In analyzing the terms of the LLC Act, including its reference to the PC Act, we may apply well recognized principles of statutory construction. "Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation]" (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.) "' In determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning.' "(*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) "' The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.' "(*Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 268.)

We must determine the scope of "professional services" as that term is used in sections 13401, 13401.3, and 17375. "[S]tandard dictionaries . . . generally define ' profession' as ' a calling requiring specialized knowledge and often long and intensive academic preparation.' "(*Hollingsworth v. Commercial Union Ins. Co.* (1989) 208 Cal.App.3d 800, 806.) Thus, the adjective "professional" is ordinarily defined as "engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency." (Webster's 3d New Internat. Dict. (2002), p. 1811.) Similarly, a "professional" is "a person who belongs to a learned profession or whose occupation requires a high level of training and proficiency." (Black's Law Dict. (7th ed. 1999), p. 1226.)

In *Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, the court concluded that the services

performed pursuant to a vehicle salesperson license issued under the Vehicle Code were not "professional services," but rather were "nonprofessional, occupational" services. The court analyzed the differences between the two as follows:

> " . . . [C]ourts have drawn a clear distinction between professional licenses, such as veterinarians or psychologists, and nonprofessional occupational licenses. In *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894 . . ., this court held that the preponderance of the evidence standard should be used in administrative proceedings to suspend or revoke a food processor's license. The court noted that a food processor's license could be obtained without meeting any educational or skill requirements. The only specific requirements for obtaining such a license were that the applicant show ' "character, responsibility, and good faith" ' and a sound financial status. [Citation.] In contrast, in order to obtain a professional license, an applicant must ordinarily satisfy extensive educational and training requirements and pass a rigorous state-administered examination. [Citation.] . . . .
>
> "A vehicle salesperson's license is a nonprofessional license. The license carries no educational, training or testing prerequisites. [Citation.] All of the application criteria concern historical evidence of the applicant's ' character, honesty, integrity, and reputation,' and information regarding prior court judgments and disciplinary actions. [Citation.] . . . ." (*Id.* at pp. 318-319.)

Following the reasoning of *Mann*, we find that some services that require a license, certification, or registration pursuant to the Business and Professions Code are "professional services" and others are "nonprofessional services." To determine whether a particular service is one or the other requires an examination of the educational, training, and testing prerequisites.[FOOTNOTE 2]

Returning to the language of section 17375, we note that an LLC is not permitted "to render professional services." An LLC would be permitted to perform "nonprofessional services" without violating this statute. As for section 17375's reference to "subdivision (a) of Section 13401 and . . . Section 13401.3," here again these two statutes refer to "professional services" that are performed "pursuant to a license, certification, or registration . . . ." Consequently, "nonprofessional services" that require a license, certification, or registration pursuant to the Business and Professions Code would not be covered by the definitions contained in sections 13401 or 13401.3, thus allowing an LLC to perform "nonprofessional services" under the terms of these two statutes.

In so construing the language of sections 13401, 13401.3, and 17375, we harmonize the provisions of the LLC Act and the PC Act. The one refers to the other, and we read the two statutory schemes as a whole. While professional services may not be performed by an LLC, they may be performed by a professional corporation formed under the PC Act. (§ § 13402, 13404.) For example, while attorneys are barred from forming an LLC under the terms of section 17375, they may form a law corporation under the PC Act as authorized by the State Bar Act (see Bus. & Prof. Code, § § 6160-6172). Such other professionals as doctors, dentists, chiropractors, speech pathologists and audiologists, physical therapists, nurses, psychologists, optometrists, pharmacists, veterinarians, marriage and family counselors, clinical social workers, accountants, architects, and shorthand reporters may form professional corporations under the PC Act. Thus, the authorization contained in the PC Act for the rendering of "professional services" in corporate form confirms our construction of the LLC Act.[FOOTNOTE 3]

We conclude that a business that provides services requiring a license, certification, or registration pursuant to the Business and Professions Code may conduct its activities as an LLC if the services rendered require only a nonprofessional, occupational license.

July 27, 2004 CALIFORNIA

:::::::::::::::::::::::::::::: FOOTNOTE(S) ::::::::::::::::::::::::::::::

FN1. All references hereafter to the Corporations Code are by section number only.

FN2. Applying the *Mann* test to each licensed activity specified in the Business and Professions Code is beyond the scope of this opinion.

FN3. We recognize that for some purposes, the term "professional services" has been broadly construed. (See, e.g., *Amex Assurance Co. v. Allstate Ins. Co.* (2003) 112 Cal.App.4th 1246, 1252 [for purposes of a homeowner's insurance policy, "the word ' professional' is no longer limited to the ' learned professions,' but has a broader scope that includes skilled services such as plumbing"]; *Hollingsworth v. Commercial Union Ins. Co., supra,* 208

Cal.App.3d at p. 806 [for purposes of a merchant insurance policy, "' professional' encompasses a broad range of activities beyond those traditionally considered ' professions,' such as medicine, law, or engineering"].) Here, we are construing the term "professional services" only for purposes of the LLC Act and its further reference to the PC Act.

*755 So. 2d 792, *; 2000 Fla. App. LEXIS 4416, **

R. ROBERT RUGGIO and PICTURE ARCHIVE COMMUNICATIONS SERVICES, L.L.C., a Florida limited liability company, Appellants, v. DONALD Q. VINING, Appellee.

CASE NO. 2D99-1285

COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

755 So. 2d 792; 2000 Fla. App. LEXIS 4416

April 14, 2000, Opinion Filed

SUBSEQUENT HISTORY: [1]** Released for Publication May 22, 2000.

PRIOR HISTORY: Appeal from the Circuit Court for Collier County; Hugh D. Hayes, Judge.

DISPOSITION: Reversed and remanded for further proceedings consistent with this opinion.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed from the Circuit Court for Collier County (Florida) after summary judgment entered for plaintiff for sums due under promissory note, holding defendant personally liable under Fla. Stat. ch. 608.437 (1995), because limited liability company, on whose behalf defendant executed the note, was not formed when note was executed.

OVERVIEW: Summary judgment entered against defendant personally on plaintiff's claim for sums due under a promissory note, under Fla. Stat. ch. 608.437 (1995), because the limited liability company, on whose behalf defendant executed the note, was not formed when the note was executed. On appeal, the court found the defenses and affidavits raised material issues of fact, notwithstanding ch. 608.437. An attorney's affidavit created a question of fact as to whether plaintiff was making a loan or a "contribution" at the time the note was executed, under Fla. Stat. ch. 608.409(4) (1995). Terms of repayment were unorthodox. There remained an issue as to whether plaintiff was estopped or had waived his **statutory** claim under ch. 608.437. It was possible that ch. 608.409(4) authorized the note by defendant on behalf of the forming **limited liability company** and that ch. 608.437 was not dispositive. Judgment was reversed and remanded.

OUTCOME: Judgment was reversed and case was remanded. An attorney's affidavit created a question of fact as to whether plaintiff was making a loan or a "contribution" which would have been authorized during the formation stage of the limited liability company, at the time the note was executed.

CORE TERMS: promissory note, unformed, estopped, estoppel, summary judgment, partner, waived, personally liable, subscription, incidental, election, obligor, lawsuit, severally liable, actual knowledge, third parties, nonexistence, partnership, opposing, innocent, jointly, elected, transact business, issues of fact, own knowledge, indebtedness, entity, loaned,

holder, incur

LexisNexis (TM) HEADNOTES - Core Concepts - ◆ Hide Concepts

Business & Corporate Entities > Corporations > Formation > Preincorporation

HN1 Fla. Stat. ch. 607.0204 (1995) provides that a person acting on behalf of a corporation, while knowing the corporation is not in existence, is personally liable for the liabilities thus incurred unless the liability is to a person who also knew of the corporation's nonexistence. More Like This Headnote

Business & Corporate Entities > Corporations > Formation > Preincorporation

HN2 See Fla. Stat. ch. 608.437 (1995).

Business & Corporate Entities > Corporations > Formation > Preincorporation

HN3 See Fla. Stat. ch. 608.409(4) (1995).

Business & Corporate Entities > Corporations > Formation > Preincorporation

HN4 Fla. Stat. ch. 608.437 (1995), unlike Fla. Stat. ch. 607.0204 (1995) (a similar provision applicable to corporations), did not make an exception for liabilities to persons who share knowledge of the **limited liability company's** nonexistence. In 1999, the **legislature** added the following language: except for any liability to any person who also had actual knowledge that there was no organization of a **limited liability company.** 1999 Fla. Laws ch. 99- 315; Fla. Stat. ch. 608.4238, (1999). Nonetheless, on a claim involving Fla. Stat. ch. 608.437, the traditional defenses of waiver and estoppel remain available notwithstanding the silence of ch. 608.437 on this issue. More Like This Headnote

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative Defenses

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Waiver & Preservation

HN5 Parties, by their own knowledge and conduct, can waive or be estopped to raise a wide array of constitutional, statutory, and common law rights that do not contain any express waiver or estoppel clause. More Like This Headnote

Business & Corporate Entities > Corporations > Formation > Preincorporation

HN6 Fla. Stat. ch. 608.437 should not be read in a vacuum. Fla. Stat. ch. 608.409(4) (1995) states that a limited liability company is not to transact business or incur indebtedness except that which is incidental for its organization or to obtaining subscriptions for or payment of contributions until the articles of organization have been filed by the Department of State. As with traditional corporations, a promoter of a limited liability company must take steps to create a new company. The very nature of a legal entity created by a formal filing with the state requires that certain actions be taken prior to incorporation. More Like This Headnote

Business & Corporate Entities > Limited Liability Businesses

HN7 **Limited liability companies** were authorized by the Florida **legislature** in 1993. 1993 Fla. Laws ch. 93-284. The companies are a hybrid, providing the shield from personal liability found in corporations and flow-through tax advantages found in partnerships. More Like This Headnote

COUNSEL: John F. Hooley, Naples, for Appellants.

Jeanette Martinez Lombardi of Porter, Wright, Morris & Arthur, Naples, for Appellee.

JUDGES: ALTENBERND, Acting Chief Judge. CASANUEVA and GREEN, JJ., Concur.

OPINIONBY: ALTENBERND

OPINION:

[*793] ALTENBERND, Acting Chief Judge.

R. Robert Ruggio appeals a summary final judgment in favor of Donald Q. Vining on a promissory note that Mr. Ruggio signed in his representative capacity as majority shareholder of Picture Archive Communications Services, a Florida limited liability company. The trial court determined that Mr. Ruggio was personally liable on the promissory note because the limited liability company had not yet been formed when he signed the note. We reverse and remand because the record does not resolve all material issues of fact regarding Mr. Vining's own knowledge and participation in the unformed limited liability company.

The record in this case is not extensive. Mr. Vining filed a complaint against **[**2]** Mr. Ruggio and Picture Archive Communications Services, L.L.C., to collect upon a $ 100,000 promissory note. A default judgment was entered against the limited liability company, and it is no longer an active participant in this lawsuit.

On the claim against Mr. Ruggio, the complaint alleged that Mr. Vining loaned money to the limited liability company on October 10, 1995. The complaint alleged that Mr. Ruggio signed the note on behalf of the company, representing that the limited liability company had already been formed. In fact, the limited liability company was registered with the Secretary of State of Florida on March 7, 1996. The complaint maintained that Mr. Vining did not know that the company had not been created. Thus, Mr. Vining alleged that Mr. Ruggio was personally liable for the loan.

Mr. Ruggio answered this complaint, admitting that the note existed and that the limited liability company was in default for failing to make interest payments. He affirmatively alleged, however, that Mr. Vining knew about the company's status when the note was delivered and that Mr. Vining had participated as an agent, officer, or representative of the unformed **limited liability company [**3]** in 1995 and 1996. Based upon these allegations, Mr. Ruggio raised three affirmative defenses, contending that Mr. Vining's claim was barred by laches, estoppel, and section 607.0204, Florida **Statutes** (1995). n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 *HN1* Section 607.0204, Florida Statutes (1995), provides that a person acting on behalf of a corporation while knowing the corporation is not in existence is personally liable for the liabilities thus incurred unless the liability is to a person who also knew of the corporation's nonexistence. The trial court properly determined that this **statute** did not apply concerning a **limited liability company.** To the extent counsel for Mr. Ruggio has continued to rely upon this **statute** in his brief on appeal, he has not assisted this court in a proper analysis of his own case. Nonetheless, his limited argument concerning the application of section 608.437, Florida **Statutes** (1995), a provision which is applicable to this **limited liability company,** is sufficient to preserve the issue on appeal.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**4]**

[*794] The promissory note involved in this case is not a typical negotiable instrument. Mr. Vining loaned the money for a period of five years and required that the company make only annual interest payments. The provision for payment of principal upon this note is very

unusual. The note stated, in part:

The holder of this note shall be entitled to issuance of 1% of all shares of stock authorized to be issued by the articles of incorporation filed in the State of Florida by the **obligor** of the note in lieu of payment at holder's election. Said election to be made in writing to the **obligor, at the obligor's** usual place of business at any time prior to the due date of this note. Such election and acceptance of shares issued shall constitute payment in full under the terms of this note.

When Mr. Vining first moved for summary judgment, he supported the motion with affidavits. On the issue of Mr. Vining's knowledge of and involvement with the company, his affidavit stated only: "At the time of the execution of the note, I was not aware that the limited liability company, Picture Archive Communications Services, had not yet been formed."

In opposition to summary judgment, Mr. Ruggio filed **[**5]** the affidavit of an attorney who had been involved in the creation of the company and the execution of the promissory note. The attorney claimed that he had extensive pre-incorporation dealings with Mr. Vining. During those dealings, they had discussed whether Mr. Vining should loan money to the new entity or whether he should make a contribution of equity. The attorney stated under oath: "On or about October 10, 1995, I discussed with Donald Q. Vining the fact that the corporation was not formed at the time he executed the promissory note and reminded him that he needed to determine how he wished to structure his equity position and method of repayment as to the money contributed." The attorney further claimed that no funds changed hands when the note was executed. Finally, it was the attorney's position that the formal establishment of the company was delayed by Mr. Vining's indecision about whether he wanted to have an equity position, an issue which Mr. Vining told the attorney he had discussed with an accountant.

After the opposing affidavits were filed, Mr. Vining amended his motion for summary judgment. The amended motion essentially argued that sections 608.437 **[**6]** and 608.409(4), Florida **Statutes** (1995), applied in this case and that these **statutes** rendered the content of the opposing affidavits irrelevant. Section 608.437 provides:

*HN2*All persons who assume to act as a **limited liability company** without authority to do so shall be jointly and severally liable for all debts and liabilities.

Section 608.409(4), Florida **Statutes** (1995), provides:

*HN3*A **limited liability company** shall not transact business or incur indebtedness, except that which is incidental to its organization or to obtaining subscriptions for or payment of contributions, until the articles of organization have been filed by the Department of State.

It is clear from the summary judgment hearing that the trial court was persuaded by this argument and entered judgment accordingly. We disagree with the trial court's conclusion because the defenses and affidavits contained in the record raise material issues of fact, notwithstanding the provisions of section 608.437.

First, assuming that any person was acting "without authority" in the transactions surrounding the inception of this limited liability company, the affidavits **[**7]** in opposition to summary judgment and the unorthodox terms of the promissory note call into question whether Mr. Vining himself was assuming to act as the limited liability company when negotiating this loan for the unformed limited liability company. If so, Mr. Vining would be jointly and severally liable for the **obligations** incurred by the as-yet unformed company under section 608.437. The amount he **[*795]** might be entitled to collect on this company debt to himself, if any, would apparently be affected by principles of contribution. See § 46.011, Fla. Stat. (1995).

Even if Mr. Vining was not acting on behalf of the unformed company, the defenses of waiver and estoppel create questions of fact in this case. This is true, even though those defenses are not specifically incorporated into section 608.437. HN4 Section 608.437, unlike section 607.0204, Florida Statutes (1995) (a similar provision applicable to corporations), does not make an exception for liabilities to persons who share knowledge of the company's nonexistence. Admittedly, the **statute** would have been better drafted if it had contained the language "except for any liability **[**8]** to any person who also had actual knowledge that there was no organization of a **limited liability company." The legislature** actually added this precise language to the **statute** in 1999. See Ch. 99- 315, Laws of Fla.; § 608.4238, Fla. Stat. (1999). The new **statutory** language, however, does not apply to this 1995 promissory note. Nonetheless, the traditional defenses of waiver and estoppel remain available notwithstanding the silence of section 608.437 on this issue.

The purpose of statutes like section 608.437 is to protect innocent third parties who have dealings with an entity that does not exist and never becomes adequately capitalized. See generally 1 William E. Knepper & Dan A. Bailey, Liability of Corporate Officers & Directors 218-20 (5th ed. 1993). If Mr. Vining were permitted to obtain this judgment when he had actual knowledge of the circumstances, there would be a risk that Mr. Ruggio would not have the resources to pay truly innocent third parties who lacked such knowledge. HN5 Parties, by their own knowledge and conduct, can waive or be estopped to raise a wide array of constitutional, statutory, and common law rights that do not contain **[**9]** any express waiver or estoppel clause. See, e.g., Stewart v. State, 491 So. 2d 271, 272 (Fla. 1986) (defendant waived speedy trial by requesting continuance); Independent Fire Ins. Co. v. Arvidson, 604 So. 2d 854, 857-58 (Fla. 4th DCA 1992) (party to lawsuit waived right to jury trial in pretrial statement); Fiske v. Shelton, 469 So. 2d 248 (Fla. 2d DCA 1985) (first partner who elected not to sue second partner for breach of contract but instead elected to receive additional partnership shares was estopped from seeking further reimbursement from second partner in lawsuit); Lipkin v. Bonita Garden Apts., Inc., 122 So. 2d 623 (Fla. 3d DCA 1960) (lessee estopped from claiming lease void after occupying premises for apartment for extended period of time). Thus, there remains a genuine issue as to whether Mr. Vining is estopped or has waived his **statutory** claim under section 608.437.

Finally, HN6 section 608.437 should not be read in a vacuum. Section 608.409(4), Florida **Statutes** (1995), states that a **limited liability company** is not to transact business or incur indebtedness "except that which **[**10]** is incidental for its organization or to obtaining subscriptions for or payment of contributions until the articles of organization have been filed by the Department of State." As with traditional corporations, a promoter of a limited liability company must take steps to create a new company. n2 The very nature of a legal entity created by a formal filing with the state requires that certain actions be taken prior to incorporation.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 HN7 **Limited liability companies** were authorized by the **legislature** in 1993. See Ch. 93-284, Laws of Fla. The companies are a hybrid, providing the shield from personal liability found in corporations and flow-through tax advantages found in partnerships. See William H. Copperthwaite, Jr., Limited Liability Companies: The Choice for the Future, 103 Comm. L. J. 222 (1998). See also Ronald J. Klein, et al., The New Limited Liability Company in Florida, 73 Fla. B.J. 42, 43 (Aug. 1999).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

In this case, the record does not resolve whether the execution **[**11]** of this unusual promissory note was "incidental" for **[*796]** the limited liability company's organization or a "subscription" or "contribution." The attorney's affidavit alone created a question of fact as to whether Mr. Vining was making a loan or a "contribution" at the time the note was executed. See § 608.402(7), Fla. Stat. (1995). Thus, it is possible that section 608.409(4) authorized this note by Mr. Ruggio on behalf of the forming limited liability company and that section 608.437 is not dispositive. Cf. Levine v. Levine, 734 So. 2d 1191, 1195-97 (Fla. 2d DCA 1999) (limiting scope of business of dissolved corporation to acts of "winding up and liquidating its business and affairs"). Reversed and remanded for further proceedings consistent with this opinion.

CASANUEVA and GREEN, JJ., Concur.

*195 Misc. 2d 762, *; 761 N.Y.S.2d 766, **;*
*2003 N.Y. Misc. LEXIS 501, ****

MONTE CARLO, L.L.C., Petitioner(s), vs. WILLIE YORRO, "JOHN DOE" and 'JANE DOE", Respondent(s).

INDEX NO. SP1147/03

DISTRICT COURT OF NEW YORK, FIRST DISTRICT, NASSAU COUNTY

195 Misc. 2d 762; 761 N.Y.S.2d 766; 2003 N.Y. Misc. LEXIS 501

April 30, 2003, Decided

NOTICE: [*1]** THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING THE RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE MISCELLANEOUS REPORTS.

SUBSEQUENT HISTORY: Counsel Corrected May 23, 2003.

DISPOSITION: Respondent's application was granted to the extent that this action was stayed until such time as petitioner appears by an attorney.

CASE SUMMARY

PROCEDURAL POSTURE: Respondent tenant moved for an order pursuant to N.Y. C.P.L.R. § 3211(A)(5) to dismiss this non-payment proceeding on the grounds that petitioner limited liability company did not appear by an attorney.

OVERVIEW: A reading of the Limited Liability Company Law and authorities persuaded the court to find that limited liabilities companies had to appear by an attorney because limited liability companies had the attributes of a voluntary association with corporate limited liability protection and therefore, were to be treated as such for the purposes of N.Y. C.P.L.R. § 321(a). Where the limited liability company failed to appear by a member rather than an attorney, the action was stayed until such time as the limited liability company appeared by an attorney.

OUTCOME: The motion for dismissal was granted to the extent that this action was stayed until such time as the limited liability company appeared by an attorney.

CORE TERMS: partnership, licensed, pro se, entity, appearing, accountable, personally liable, propria persona, practice of law, shareholders, artificial, appointed, misplaced, exempt, personal liability, unincorporated, contractual, shield

LexisNexis (TM) HEADNOTES - Core Concepts - ◆ Hide Concepts

Business & Corporate Entities > Limited Liability Businesses > Management Duties & Liabilities

HN1 A limited liability company must appear by an attorney. More Like This Headnote

Business & Corporate Entities > Limited Liability Businesses > Management Duties & Liabilities

HN2 The fact that a petitioner does not elect not to call his company a corporation does not exempt him from N.Y. C.P.L.R. § 321 as a voluntary association. N.Y. C.P.L.R. § 321 must include a limited liability company (LLC) under the rubric of corporations and voluntary associations because an individual creates a legal entity and invests it with property thus shielding the individual from liability. The individual owner cannot benefit from the protections of the Department of State by virtue of being an LLC but then disclaim the very status that affords those protections to avoid engaging an attorney to represent him in summary proceedings. More Like This Headnote

Business & Corporate Entities > Limited Liability Businesses > Management Duties & Liabilities

HN3 See N.Y. Ltd. Liab. Co. Law § 102(m).

Business & Corporate Entities > Limited Liability Businesses > Formation

HN4 A limited liability company is defined as an unincorporated organization of one or more persons having limited liability for the contractual **obligations** and other liabilities of the business, and is other than a partnership or a trust. More Like This Headnote

Business & Corporate Entities > Limited Liability Businesses > Formation

HN5 Normally, a limited liability company will possess the corporate characteristic of limited liability because, in addition to taxation as a partnership, limited liability is one of the primary purposes for which the entity is formed. More Like This Headnote

Business & Corporate Entities > Corporations > Directors & Officers > Management Duties & Liabilities

Business & Corporate Entities > Limited Liability Businesses > Management Duties & Liabilities

HN6 A professional corporation of attorneys can be represented by one of its member attorneys because a professional corporation of attorneys can appear by its member lawyers. More Like This Headnote

Business & Corporate Entities > Limited Liability Businesses > Management Duties & Liabilities

HN7 A professional services corporation's shareholders cannot be held personally liable for an ordinary business debt of the corporation. More Like This Headnote

Business & Corporate Entities > Corporations > Directors & Officers > Management Duties & Liabilities

Business & Corporate Entities > Limited Liability Businesses > Management Duties & Liabilities

HN8 A corporation cannot maintain litigation in propria persona, or appear in court through an officer of the corporation or an appointed agent not admitted to the practice of law. By analogy, then, a limited liability company, as a separate legal entity, cannot maintain litigation in propria persona, or appear in court through an appointed agent not admitted to the practice of law. More Like This Headnote

Business & Corporate Entities > Corporations > Formation > Corporate Purpose & Powers

Business & Corporate Entities > Limited Liability Businesses > Management Duties & Liabilities

HN9 Artificial entities must appear by counsel. More Like This Headnote

Business & Corporate Entities > General Partnerships > Management Duties & Liabilities

Business & Corporate Entities > Corporations > Formation > Corporate Purpose & Powers

Business & Corporate Entities > Limited Liability Businesses > Management Duties & Liabilities

HN10 28 U.S.C.S. § 1654, providing that parties may plead and conduct their own cases personally or by counsel, does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney. More Like This Headnote

COUNSEL: Community Legal Assistance Corp. for Willie Yorro, respondent.

JUDGES: BEFORE: HON. SCOTT FAIRGRIEVE, DISTRICT COURT JUDGE.

OPINIONBY: Scott FAIRGRIEVE

OPINION: [767] [*762] DECISION**

Facts

Respondent tenant, Willie Yurro moves for an order pursuant to CPLR § 3211(a)(5) to dismiss this non-payment proceeding on the grounds that the petitioner is a limited liability company that did not appear by an attorney. The notice of petition and petition are executed by "Emilia Patterson - Authorized Member Petitioner, Pro Se".

[*763] Respondent's counsel argues that New York Law prohibits a limited liability company from appearing in an action unless the limited liability company appears by an attorney. Petitioner's member, Emilia Patterson argues that a limited liability company has more attributes of a partnership than a corporation and therefore it is not required to appear by counsel.

Decision

This court could find no appellate authority on this subject. A search does reveal that Tierra West Apts. LLC v. Bobadilla, 4/21/99, NYLJ, **[***2]** p.25, col.3 (Civil Ct., Housing, Judge Spears), held that HN1 a limited liability company must appear by an attorney. Judge Spears determined that the petitioner was a voluntary association with the same benefits of a shield against personal liability as a corporation:

HN2 "The fact that petitioner has elected not to call his company a 'corporation' does not exempt him from CPLR 321(a) as a "voluntary association." Obviously, petitioner is a voluntary association. Thus, CPLR 321(a) must include an LLC under the rubrick of corporations and voluntary associations because herein an individual has created a legal entity and invested it with property designating it as the landlord. This structure shields the individual from liability. Under these circumstances, there is no reason to differentiate the limited liability company from a corporation or a similarly formed voluntary association which must be represented by an attorney when appearing before the court. Petitioner offers the Court no rationale to make any distinction. Thus, the court finds that the individual owner cannot benefit from the protections of the Department of State by virtue of being an LLC but then disclaim the very status **[***3]** that affords those protections to avoid engaging an attorney to represent him in summary proceedings before the Housing Court."

The New York Limited Liability Company Law § 102(m) states:

"(m) HN3 "Limited liability company" and "domestic limited liability company" mean, unless the context otherwise requires, an unincorporated organization of one or more persons having limited liability for the contractual **obligations** and other liabilities of the business (except as authorized in section six hundred nine of this chapter), other than a partnership

[*764] or trust, formed and existing under this chapter and the laws of this state."

As defined in Rich, Practice Commentaries (McKinney's Consolidated Laws of New York, Book 32A, Limited Liability Company Law, 2003 Pamphlet at 3-4):

HN4 "An LLC is defined as an unincorporated organization of one or more persons having limited liability for the contractual **obligations** and other liabilities of the business, and is other than a partnership or a trust."

16 NY Jur. p. 324, § 2010, Business Relationships states:

HN5 "Normally, a limited liability company (LLC) will possess the corporate characteristic of limited liability because, in **[***4]** addition to taxation as a partnership, **[**768]** limited liability is one of the primary purposes for which the entity is formed."

Respondent has cited LLC § 610 for the proposition that a member of a limited liability corporation cannot represent the limited liability company and that an attorney must represent same. LLC § 610 states:

"A member of a limited liability company is not a proper party to proceedings by or against a **limited liability company,** except where the object is to enforce a member's right against or liability to the **limited liability company.**"

The court finds the respondent's reliance on **Limited Liability Company** Law § 610 is misplaced. This **statute** pertains to the circumstances when a member can be a party to a lawsuit.

There is no indication that this **statute** permits a member to appear and represent the **limited liability company** without an attorney.

In Toren v. Anderson, Kill and Olick, 185 Misc. 2d 23, 710 N.Y.S.2d 799 (Sup. Ct., N.Y. County 2000), the court held that HN6 a professional corporation of attorneys could be represented by one of its member attorneys because:

"A professional **[***5]** corporation of attorneys can appear by its member lawyers. *See Austrian, Lance & Stewart v. Hastings Props., 87 Misc. 2d 25, 26, 385 N.Y.S.2d 466 (Sup.Ct.N.Y.Co.1976)*; cf. *Gilberg v. Lennon, 212 A.D.2d 662, 664, 622 N.Y.S.2d 962 (2nd Dep't 1995)* (holding that a partnership of attorneys can appear *pro se,* citing *Austrian* with approval, and stating as *dictum* that CPLR § 321(a) is inapplicable to professional corporations of attorneys). In *Austrian*, the plaintiff, a professional corporation of attorneys, moved for summary judgment upon a promissory note. Defendant objected to plaintiff appearing *pro se*, but the Court permitted plaintiff to represent itself. **[*765]** *See Austrian, 87 Misc. 2d at 26, 385 N.Y.S.2d 466*. The Court noted that the reason corporations are required to act through attorneys is that a corporation is a hydra-headed entity and its shareholders are insulated from personal responsibility. There must therefore be a designated spokesman accountable to the court. This reasoning does not apply in the case of a professional corporation where personal liability attaches **[***6]** and each member (in this case a law firm) is qualified to appear before the court and argue its case.

Supra, 87 Misc. 2d at 26, 385 N.Y.S.2d 466. Here, each of AKO's members is a licensed and accountable officer of the Court, with authority to appear before it. Accordingly, the rationale for barring corporations from appearing *pro se*, namely that nonlawyer agents are not accountable to the Court, is inapplicable to the members of AKO.

Plaintiff cites *We're Assocs. Co. V. Cohen, Stracher & Bloom, P.C.*, 65 N.Y.2d 148, 490 N.Y.S.2d 743, 480 N.E.2d 357 (1985), to support his contention that AKO cannot appear by its member attorneys, because the members cannot be held individually liable in this action, but plaintiff's reliance on the case is misplaced. In *We're Assocs.*, the Court held that under N.Y. Bus. Corp. Law § 1505(a), HN7 a professional services corporation's shareholders cannot be held personally liable for an ordinary business debt of the corporation. *Id.*, 65 N.Y.2d at 150-53, 490 N.Y.S.2d 743, 480 N.E.2d 357. Plaintiff points out that, like the professional **[***7]** services corporation members in *We're Assocs.*, AKO's member attorneys cannot be held personally liable to plaintiff, but that has no bearing on whether AKO can represent itself through those members. Pursuant to CPLR § 321(a), the members' status as licensed attorneys enables them to appear **[**769]** for AKO, whether or not the members could be held liable in this action."

The court allowed a member attorney to appear because the attorney is qualified (licensed) to appear and act in court. In the case at bar, the member of petitioner is not licensed to appear and act in court.

In Board of Education of Whitehall City School District v. Franklin County Board of Revision, 2002 Ohio 1256, 2002 WL 416953 (Ohio App. 10 Dist.), the court held that a limited liability company must appear by an attorney:

HN8 **[*766]** "In *Union Savings Assn. v. Home Owners Aid*(1970), 23 Ohio St. 2d 60, 262 N.E.2d 558, syllabus, the Ohio Supreme Court held that "[a] corporation cannot maintain litigation *in propria persona*, or appear in court through an officer of the corporation or an appointed agent not admitted to the practice of law." By analogy, **[***8]** then, a limited liability company, as a separate legal entity, cannot maintain litigation *in propria persona*, or appear in court through an appointed agent not admitted to the practice of law."

In Rowland v. California Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 113 S. Ct. 716, 121 L. Ed. 2d 656 (1993), the court indicated that HN9 artificial entities must appear by counsel:

HN10 "The state of the law, however, leaves it highly unlikely that Congress would have made either assumption about an artificial entity like an association, and thus just as unlikely that "person" in § 1915 was meant to cover more than individuals. It has been law for the better part of two centuries, for example, that a corporation may appear in the federal courts only through licensed counsel. *Osborn v. President of Bank of United States*, 22 U.S. 738, 9 Wheat. 738, 829, 6 L. Ed. 204 (1824); see *Turner v. American Bar Assn.*, 407 F. Supp. 451, 476 (ND Tex. 1975) (citing the "long line of cases" from 1824 to the present holding that a corporation may only be represented by licensed counsel), affirmance order *sub Nom. Taylor v. Montgomery, 539 F.2d 715* **[***9]** (Table) (CA7 1976), and aff'd *sub Nom. Pilla v. American Bar Assn., 542 F.2d 56 (CA8 1976)*. As the courts have recognized, the rationale for that rule applies equally to all artificial entities. Thus, save in a few aberrant cases, the lower courts have uniformly held that 28. U.S.C. § 1654, providing that "parties may plead and conduct their own cases personally or by counsel," does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney."

A reading of the Limited Liability Company Law and the above authorities persuade this court to find that limited liabilities companies must appear by an attorney. Limited liability companies have the attributes of a voluntary association with corporate limited liability protection and therefore should be treated as such for the purposes of CPLR § 321(a).

[*767] Conclusion

Based upon the above, this court holds that limited liability companies must appear by an attorney unless exempt to do so under CPLR § 321. Respondent's application is granted to the extent that this action is stayed until such time as **[***10]** petitioner appears by an attorney.

So ordered.

ENTER:

DISTRICT COURT JUDGE

Dated: April 30, 2003

Rev. Rul. 2004-77, 2004-31 I.R.B. 119 (8/2/2004)

Section 7701.-Definitions

26 CFR 301.7701-1: Classification of organizations for federal tax purposes.

(Also: Section 301.7701-2, 301.7701-3.)

Disregarded entities. This ruling concludes that, if an eligible entity has two owners under local law, but one of the owners is, for federal tax purposes, disregarded as an entity separate from the other owner of the eligible entity, then the eligible entity cannot be classified as a partnership and is either disregarded as an entity separate from its owner or an association taxable as a corporation.

Rev. Rul. 2004-77

ISSUE

How is an eligible entity (as defined in section 301.7701-3(a) of the Procedure and Administration Regulations) classified for federal tax purposes if the entity has two members under local law, but one of the members of the eligible entity is disregarded as an entity separate from the other member of the eligible entity for federal tax purposes?

FACTS

Situation 1. *X*, a domestic corporation, is the sole owner of *L*, a domestic limited liability company (LLC). Under section 301.7701-3(b)(1), *L* is disregarded as an entity separate from its owner, *X*. *L* and *X* are the only members under local law of*P* , a state law limited partnership or LLC. There are no other constructive or beneficial owners of *P* other than *L* and *X*. *L* and *P* are eligible entities that do not elect under section 301.7701-3(c) to be treated as associations for federal tax purposes.

Situation 2. *X* is an entity that is classified as a corporation under section 301.7701-2(b). *X* is the sole owner of *L*, a foreign eligible entity. Under section 301.7701-3(c), *L* has elected to be disregarded as an entity separate from its owner. *L* and *X* are the only members under local law of *P*, a foreign eligible entity. There are no other constructive or beneficial owners of *P* other than *L* and *X*.

LAW AND ANALYSIS

Section 7701(a)(2) of the Internal Revenue Code provides that the term partnership includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not a trust, estate, or corporation.

Section 301.7701-1(a)(1) provides that whether an organization is an entity separate from its owners for federal tax purposes is a matter of federal tax law and does not depend on whether the organization is recognized as an entity under local law.

Section 301.7701-2(a) provides that a business entity is any entity recognized for federal tax purposes (including an entity with a single owner that may be disregarded as an entity separate from its owner under section 301.7701-3) that is not properly classified as a trust under section 301.7701-4 or otherwise subject to special treatment under the Code. A business entity with two or more owners is classified for federal tax purposes as either a corporation or a partnership. A business entity with only one owner is classified as a corporation or is disregarded; if the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner.

Section 301.7701-2(c)(1) provides that, for federal tax purposes, the term "partnership" means a business entity that is not a corporation under section 301.7701-2(b) and that has at least two owners.

Section 301.7701-2(c)(2)(i) provides, in general, that a business entity that has a single owner and is not a corporation under section 301.7701-2(b) is disregarded as an entity separate from its owner. Section 301.7701-3(a) provides that a business entity that is not classified as a corporation under section 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an eligible entity) can elect its classification for federal tax purposes. An eligible entity with at least two owners can elect to be classified as either an association (and thus a corporation under section 301.7701-2(b)(2)) or a partnership, and an eligible entity with a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner.

Section 301.7701-3(b)(1) provides generally that in the absence of an election otherwise, a domestic eligible entity is (a) a partnership if it has at least two members, or (b) disregarded as an entity separate from its owner if it has a single owner.

Section 301.7701-3(b)(2) provides generally that, in the absence of an election otherwise, a foreign eligible entity is (a) a partnership if it has two or more owners and at least one owner does not have limited liability, (b) an association if all its owners have limited liability, or (c) disregarded as an entity separate from its owner if it has a single owner that does not have limited liability.

Situation 1. Under section 301.7701-2(c)(2),*L* is disregarded as an entity separate from its owner, *X*, and its activities are treated in the same manner as a branch or division of *X*. Because *L* is disregarded as an entity separate from *X*, *X* is treated as owning all of the interests in *P*. *P* is a domestic entity, with only one owner for federal tax purposes, that has not made an election to be classified as an association taxable as a corporation. Because *P* has only one owner for federal tax purposes, *P* cannot be classified as a partnership under section 7701(a)(2). For federal tax purposes, *P* is disregarded as an entity separate from its owner.

Situation 2. Under section 301.7701-3(c), *L* is disregarded as an entity separate from its owner, *X*, and its activities are treated in the same manner as a branch or division of *X*. Because *L* is disregarded as an entity separate from *X*, *X* is treated as owning all of the interests in *P*. Because *P* has only one owner for federal tax purposes, *P* cannot be classified as a partnership under section 7701(a)(2). For federal tax purposes, *P* is either disregarded as an entity separate from its owner or an association taxable as a corporation.

HOLDING

If an eligible entity has two members under local law, but one of the members of the eligible entity is, for federal tax purposes, disregarded as an entity separate from the other member of the eligible entity, then the eligible entity cannot be classified as a partnership and is either disregarded as an entity separate from its owner or an association taxable as a corporation.

DRAFTING INFORMATION

The principal author of this revenue ruling is Jason T. Smyczek of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue ruling, contact Mr. Smyczek at (202) 622-3050 (not a toll-free call).

Kimberly S. Bogie

From: Jack S. Johal
Sent: Tuesday, November 30, 2004 1:21 PM
To: Kimberly S. Bogie
Subject: FW: Business Law Section Annual Legislative Review

Kim: This will be a part of the package which will be sent to the members of the Partnership Committee later this week. Jack

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From: Orloff, Susan [mailto:Susan.Orloff@calbar.ca.gov]
Sent: Monday, November 29, 2004 11:24 AM
To: Sections: Business Law Section Standing Committees 2004-2005
Cc: sec-bus-exec@calbar.org; lkolodny@akingump.com; Lynch Megan (E-mail); nina@buslaw.com
Subject: Business Law Section Annual Legislative Review

Business Law Standing Committee Chairpersons, Vice-Chairpersons, and Liaisons:

Deadlines for the 2004 Annual Review are approaching. We would appreciate each committee contributing an article that provides the most significant cases and statutory additions during the year 2004. **We will be mailing the Annual Review by Mid-April of 2005 so the deadline for submissions of final drafts is January 31, 2004.** Even if you believe that there are no significant cases or statutes in 2004, each committee should try to submit a short (i.e., two or three pages) review of whatever cases and statutes affect that committee's area from 2004.

Below are our submission guidelines for the Annual Review:

Content - Each article should be an overview of the case law and statutory developments for the previous year affecting your committee's area of law. For examples of past articles, you can access last year's Annual Review on the State Bar's Web site. Go to www.calbar.ca.gov. Then go to Business Law Section and click publications, using your password information to gain access to the Annual Review.

Style/Formatting - Any well-executed writing style is welcome: a humorous or personal tone is fine so long as the article remains professional and inoffensive. Each committee is solely responsible for the substantive accuracy of the article, including cite checking, before submission for the final deadline. Internal consistency with respect to style, cites, and formatting is most important. The California Style Manual (4th ed.) is preferred, but the editors are fairly flexible on this point, particularly if another style (such as the Uniform System of Citation: the Blue Book) is more appropriate for the piece, such as one that mostly covers federal law. Drafts should be submitted in Microsoft Word format and the editors prefer that no format commands be used in the document (as they will probably all need to be removed). Footnotes or endnotes should be inserted using Words automatic number system, not manually numbered.

Authorship/Biographical Information - We are looking for committee involvement, so each article should be drafted by a committee member and not from someone outside the committee. Biographical information and photographs are not used when the materials in the Annual Review are prepared by several members of a committee, though the authors names may be noted. If one individual has prepared the materials for the Annual Review, the authors biographical information should be provided with the article, in the event the editors of the Annual Review wish to note it with the article.

Length - 2 to 12 pages. Please try to observe our page limit, as it helps improve the quality of our publication as a whole.

Submission Contacts - Article submissions should be emailed to Nina Yablock (nina@buslaw.com), Lee Kolodny (lkolodny@akingump.com) and Megan Lynch (megan@clynchinternational.com).

Editing Rights/Consent - Editors of the Annual Review reserve the right to edit and change article submitted for publication in the Annual Review. Inclusion of an article in the Annual Review implies that the author has consented to allow the Business Law Section to publish it in the Annual Review, to post the article on the California Bar ' s Web site, and to circulate the article electronically and in other formats among members of the California Bar. Authors will be asked to execute a formal release of their copyright.

Thanks for your timely cooperation. If anyone has any comments or concerns, please email Nina Yablock (nina@buslaw.com), Lee Kolodny (lkolodny@akingump.com) or Megan Lynch (megan@clynchinternational.com).

Susan Orloff, Section Administrator
Business Law News
